

1 JOSEPH RUSSONIELLO (CSBN 44332)
United States Attorney
2 THOMAS MOORE (ASBN 4305-O78T)
Assistant United States Attorney
3 Chief, Tax Division
CYNTHIA STIER (DCBN 423256)
4 Assistant United States Attorney
9th Floor Federal Building
5 450 Golden Gate Avenue, Box 36055
San Francisco, California 94102
6 Telephone: (415) 436-7000

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

12 SHARON DE EDWARDS, M.D.,)
13 Plaintiff,)
14 v.)
15 INTERNAL REVENUE SERVICE,)
16 UNITED STATES GOVERNMENT)
17 DEPARTMENT OF TREASURY, KATHY)
JAKABCIN, Revenue Officer, and JOSEPH)
SMITH, Revenue Officer,)
18 Defendants.)]
19)

No. C-07-03102-WHA

**UNITED STATES' NO
MOTION AND
MOTION TO DISMISS**

**Date: March 20, 2008
Time: 8:00 a.m.
Place: Courtroom 9, 19**

**UNITED STATES' NOTICE OF
MOTION AND
MOTION TO DISMISS**

Date: March 20, 3008
Time: 8:00 a.m.
Place: Courtroom 9, 19th Floor

MOTION TO DISMISS AND NOTICE OF MOTION TO DISMISS

21 **PLEASE TAKE NOTICE** that on Thursday, March 20, 2008, at 8:00 a.m., in Courtroom 9,
22 19th Floor, 450 Golden Gate Avenue, San Francisco, California, the United States of America
23 will and hereby does move pursuant to Federal Rules of Civil Procedure 12(b)(5), to dismiss this
24 action. This motion is based on this notice, the ensuing memorandum of points and authorities,
25 the pleadings on file in this action, and such other arguments or evidence as may be presented to
26 the Court at the hearing.

27 //
28 //

MEMORANDUM OF POINTS AND AUTHORITIES**INTRODUCTION**

The United States moves to dismiss this action for insufficient service of process.

STATEMENT OF FACTS

On June 13, 2007, Plaintiff, Sharon De Edwards, M.D., as a corporation and as an officer thereof, filed this action seeking a refund of allegedly overpaid taxes; a release of federal tax liens securing the allegedly overpaid taxes; an accounting; injunctive relief; and damages for unlawful collection, false statements, and discrimination. Plaintiff filed the action naming as Defendants the Internal Revenue Service, United States Government Department of the Treasury, Kathy Jakabcin, Revenue Officer [IRS federal employee] and Joseph Smith, Revenue Officer [IRS federal employee].¹ The United States has filed a Certification Pursuant to 28 U.S.C. §2679(d) and Notice of Substitution substituting the United States for the named individually named federal employees.

On September 17, 2007, the Court issued an Order for Plaintiff to show cause why this case should not be dismissed for failure to prosecute. That Order was vacated and Plaintiff was ordered to serve Defendants within thirty days from September 27, 2007. See Order Vacating Order to Show Cause (Docket Entry No. 5).

Plaintiff filed a Proof of Service that they personally served Cynthia Stier, an Assistant United States Attorney for the Northern District of California, on October 16, 2007. (Docket Entry No. 12).

To date, Plaintiff has not properly served the United States pursuant to Rule 4(i)(B) because the Attorney General has not been sent a copy of the summons and complaint by registered or certified mail.

///

///

¹On October 15, 2007, Plaintiff filed an Application and Motion for Preliminary Injunction Upon Order to Show Cause which was denied by Order entered November 1, 2007.

The named defendants move to dismiss this action pursuant to Fed.R.Civ.P. 12(b)(5) for Plaintiff's failure to effect service of process as required by Fed.R.Civ.P. 4(i) and 4(m).²

DISCUSSION

Service of Process

Rule 12(b)(5) of the Fed.R.Civ.P. authorizes a motion to dismiss for insufficiency of service of process. If service of process is not accomplished within 120 days of filing an action, Rule 4(m) of the Fed.R.Civ.P. empowers the court to dismiss the action. Service of process upon the United States, its agencies and employees is governed by Fed.R.Civ.P. 4(i). To serve the United States, plaintiff must serve the Attorney General by registered or certified mail. See Fed.R.Civ.P. 4(i)(1) (B). To serve an agency of the United States or an officer or employee sued in their official capacity, plaintiff must serve the Attorney General by registered or certified mail and by sending a copy of the summons and complaint by registered or certified mail to the employee. See Fed.R.Civ.P. 4(i)(2)(B); 4(i)(1).

Service of process must be completed within 120 days after the filing of the complaint. Fed.R.Civ.P. 4(m). If plaintiff fails to timely effect service of process, the court may either dismiss the action without prejudice as to that defendant or direct such service to be effected within a specified time. If the plaintiff shows good cause for the failure, the court must extend the time for service. Absent a showing a of good cause, it is within the court's discretion whether or not to extend time or dismiss the action without prejudice. **United States v. Watches**, 366 F.3d 767,772 (9th Cir. 2004).

To date, Plaintiff has not served the United States in accordance with Rule 4(i). Plaintiff has not served the United States Attorney General in Washington D.C. pursuant to Rule 4(i) (B). Plaintiff has also failed to serve the individual employees; however, the United States has filed a Certification that these employees were acting within the scope of their employment, therefore, the United States should be substituted in their stead.

11

²The United States commenced an action against Plaintiff by filing a complaint on December 21, 2007, in which it seeks to reduce to judgment the same tax liabilities at issue in this action. **United States v. F. Anthony Edwards, et al.**, Case No. 07-6447-MEJ.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court dismiss this action pursuant to Fed.R.Civ.P. 12(b)(5) for Plaintiff's failure to effect service of process as required by Fed.R.Civ.P. 4(i) and 4(m).

Respectfully submitted,

JOSEPH RUSSONIELLO
United States Attorney

DATED: February 8, 2008

By: /s/ Cynthia Stier
CYNTHIA STIER
Assistant United States Attorney